

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

|                           |   |                        |
|---------------------------|---|------------------------|
| BENIGNO GARCIA AGUILAR,   | ) | No. CV 13-08307-VBK    |
|                           | ) |                        |
| Plaintiff,                | ) | MEMORANDUM OPINION     |
|                           | ) | AND ORDER              |
| v.                        | ) |                        |
|                           | ) | (Social Security Case) |
| CAROLYN W. COLVIN, Acting | ) |                        |
| Commissioner of Social    | ) |                        |
| Security,                 | ) |                        |
|                           | ) |                        |
| Defendant.                | ) |                        |
| _____                     | ) |                        |

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the Administrative Record ("AR") before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified AR.

Plaintiff raises the following issues:

1. Whether the Administrative Law Judge ("ALJ") properly



1 there was continued improvement, although Plaintiff had an antalgic  
2 gait pattern. He was advised to continue with progression of  
3 strengthening. Treating source orthopedic progress notes of Dr. Harris  
4 recommended continuation of therapy with definite improvement, and as  
5 the ALJ observed, Plaintiff admitted increased weight bearing  
6 activities and only infrequent limping at the end of the day. He had  
7 improvement in his lumbar spine as his gait mechanics improved. He had  
8 a normal neurological exam for both lower extremities. He was advised  
9 that he should complete physical therapy and home exercises and  
10 continue with weight-bearing activities as tolerated. Plaintiff  
11 indicated he would consider Dr. Harris' suggestion for trigger point  
12 injections for the lumbar spine. By July 2009, Plaintiff continued to  
13 have progressive improvement in the right knee with increased weight-  
14 bearing activities. He was referred to a pain management specialist  
15 for consultation regarding epidural steroid injections which, by  
16 January 2010, had not been authorized by the insurance carrier. (AR  
17 26, citing AR 285-288; 289-325; 330-359; and 434-458.)

18 In August 2010, at the request of the Department of Social  
19 Services, Plaintiff received an internal medicine evaluation  
20 ("Consultative Evaluation," or "CE") performed by Dr. Siciarz. (AR  
21 485-490.) Although Plaintiff complained that he has back pain and some  
22 knee pain when he climbs stairs or with prolonged walking (AR 27,  
23 486), the physical examination he received indicated no significant  
24 functional limitations. He had no tenderness in the back, a negative  
25 straight leg raising test, normal muscle strength, normal ambulation,  
26 and the mental status examination was grossly normal. (AR 47-48.)  
27 Consequently, Dr. Siciarz rendered an opinion that Plaintiff could  
28 perform work at a medium exertional level, stand and walk six hours,

1 and sit without restrictions. (AR 27, 489.)

2 Plaintiff notes that the ALJ failed to address work restrictions  
3 that were imposed by Plaintiff's initial treatment providers, Drs.  
4 Byer and Romero, who provided care to Plaintiff within weeks of his  
5 August 2008 injury to his back and knee. (AR 232-235, 237-239.)  
6 Because of a torn meniscus in his right knee, by mid-October 2008,  
7 Plaintiff's care was turned over to Dr. Harris, who in December 2008,  
8 performed arthroscopic surgery on Plaintiff's right knee, which the  
9 Court has noted above. (AR 229, 234, 308-325, 265-284, 308-325.)

10 The ALJ carefully reviewed Plaintiff's treatment records post-  
11 surgery, from December 2008 to January 2010. (AR 26.) As noted,  
12 despite some residual pain, Dr. Harris indicated that Plaintiff had  
13 definite improvement, with increased weight-bearing activities, a  
14 normal neurological examination, and pain reported as only  
15 intermittent. (AR 26, 289-290.)

16 Despite Plaintiff's reports of back pain beginning in March 2009,  
17 as the ALJ noted, Plaintiff's examinations by treating doctors  
18 indicated normal gait, and a good range of motion. (AR 340-354.) By  
19 January 2010, there are no further treatment records for Plaintiff's  
20 knee and back. (AR 26, 145-159, 435-437.)

21 Despite referencing Plaintiff's brief pre-surgery treatment by  
22 Drs. Byer and Romero (JS at 5-6), Plaintiff does not assert that the  
23 ALJ committed any cognizable error by failing to include the opinions  
24 and diagnoses of these physicians in determining whether a disability  
25 existed. Because these physicians treated Plaintiff for a brief period  
26 prior to his surgery, it would have been fruitless to assess error by  
27 the ALJ in failing to consider their opinions, especially since on a  
28 consistent longitudinal basis, after Plaintiff's knee surgery, he

1 experienced significant functional improvement. The fact that he had  
2 intermittent pain does not rise to the level of a disabling  
3 impairment.

4 What Plaintiff does complain about, however, is that the ALJ  
5 failed to discuss or provide any assessment of a form entitled "Lumbar  
6 Spine Residual Functional Capacity Questionnaire," filled out by Dr.  
7 Steven Nagelberg on August 10, 2011. (AR 617-620.) Dr. Nagelberg made  
8 functional assessments which, had they been accepted by the ALJ, would  
9 clearly have affected the Residual Functional Capacity ("RFC") which  
10 was ultimately assessed. But here, the Court agrees with the  
11 Commissioner's position that no error was committed by failing to  
12 provide any assessment or discussion of Dr. Nagelberg's conclusions.  
13 There are several reasons for this, which the Court will discuss.

14 First, Plaintiff's conclusion that Dr. Nagelberg acted as an  
15 examining physician in this case (see JS at 5) is suspect. The form  
16 itself indicates that all relevant treatment notes, radiologist's  
17 reports, laboratory and test results that have not been provided  
18 previously to the Social Security Administration should be attached.  
19 (AR 617.) Yet, there is nothing attached, and there are no notes  
20 indicating that Dr. Nagelberg actually examined Plaintiff. The  
21 Commissioner argues that the Court should apply harmless error  
22 analysis (see Strauss v. Commissioner of the Social Sec. Admin., 635  
23 F.3d 1135, 1138 (9th Cir. 2011)). The Court agrees. First, even if Dr.  
24 Nagelberg actually examined Plaintiff, it was an extremely brief  
25 examination which, according to the Form itself, consumed at most 45  
26 minutes. (AR 617.) Of equal or greater importance, however, is that  
27 Dr. Nagelberg's opinions are completely out of line with those of  
28 other examining physicians and treating physicians, whose conclusions

1 have been summarized in this Memorandum Opinion. Dr. Nagelberg  
2 rendered an opinion that Plaintiff had less than a sedentary  
3 exertional ability, that he could stand and walk only up to four hours  
4 in an eight-hour day, that he would need to have a sit/stand option,  
5 and that he could be absent from work two days per month. A year  
6 earlier, however, Dr. Siciarz actually did examine Plaintiff (AR 485-  
7 490), and despite Plaintiff's complaints of back pain and some knee  
8 pain when he climbed stairs or did prolonged walking, the physical  
9 examination shows no significant functional limitations. Dr. Siciarz  
10 rendered an opinion that Plaintiff could perform work at a medium  
11 exertional level, stand and walk for six hours, and sit without any  
12 restrictions. (AR 27, 489.) The ALJ gave Plaintiff some benefit,  
13 reducing his RFC to an ability to perform work at a light exertional  
14 level with occasional bending and stooping and no working around  
15 hazards. (AR 29.) The State Agency reviewing physician agreed. (AR 27,  
16 497-501.) Moreover, the extreme functional restrictions assessed by  
17 Dr. Nagelberg are almost contradictory to the progress measured by  
18 Plaintiff's treating physician, Dr. Harris, for a significant period  
19 of time after the December 2008 knee surgery. Also, as this Court has  
20 noted, the record indicates that Plaintiff responded favorably to  
21 physical therapy during this period of time.

22 In 2011, somewhat suddenly, Plaintiff indicated to his medical  
23 provider at Clinicas Del Camino Real that he was not able to work and  
24 he requested Social Security disability forms to be filled out, based  
25 on allegations of constant pain which affected his daily activities  
26 and his ability to run, sit, stand or walk. (AR 599.) Despite this, on  
27 physical examination, Plaintiff demonstrated a normal gait, negative  
28 straight leg raising test, and a normal range of motion in his back.

1 (AR 601.) In June 2011, the examination revealed no musculoskeletal  
2 problems and a normal range of motion, with good muscle strength. (AR  
3 592-593.) Again, these records completely contradict Dr. Nagelberg's  
4 apparent conclusions on a form which is not much more than a "check-  
5 the-box" form, which is entitled to little, if no credence.

6 For the above reasons, the Court must conclude that any failure  
7 by the ALJ to discuss Dr. Nagelberg's form conclusions is at most  
8 harmless error, as the result would not have been any different had  
9 the ALJ considered the outlier findings of Dr. Nagelberg.

10  
11 **B. Mental Impairment Evidence.**

12 The ALJ assessed that Plaintiff has depression as a severe  
13 impairment. (AR 25.) Nevertheless, Plaintiff asserts error in that the  
14 ALJ did not address mental functional limitations found by Dr.  
15 Criselda Abad-Santos, who performed a psychiatric CE on August 28,  
16 2010 at the request of the Department of Social Services. (AR 491-  
17 496.) Dr. Abad-Santos rendered a diagnostic impression on Axis I of  
18 major depressive disorder, recurrent, moderate. Her functional  
19 assessment was for mild limitations, inability to understand, remember  
20 and carry out simple job instructions; marked limitations in ability  
21 to do detailed and complex instructions; marked limitation in ability  
22 to relate and interact with co-workers and the public; moderate  
23 limitations in ability to maintain concentration and attention,  
24 persistence and pace; marked limitations in ability to associate with  
25 day-to-day work activity, including attendance and safety; moderate  
26 limitations in ability to accept instructions from supervisors; and  
27 marked limitations in ability to maintain regular attendance in a work  
28 place and perform work activities on a consistent basis, and to

1 perform work activities without special or additional supervision. (AR  
2 495.)

3 Further, Dr. Abad-Santos assessed that Plaintiff was currently  
4 unable to return to work and would definitely benefit from at least  
5 three months of psychiatric treatment and medications to stabilize his  
6 depressive symptoms and to prevent hospitalization. (Id.)

7 Plaintiff also received some treatment from Dr. Chang, a licensed  
8 clinical psychologist, who provided a "Final Comprehensive  
9 Psychological Report" in connection with Plaintiff's workers  
10 compensation case, on January 4, 2010. (AR 30, 423-433, 522-523.) Dr.  
11 Chang reported a mental status examination within normal limitations  
12 (AR 425), with no suicide ideations, delusions or loose thought  
13 processes (AR 425). He was attentive and cooperative during the  
14 examination and maintained excellent rapport; emotional expression was  
15 appropriate and reality testing was intact; he had good long term  
16 memory; good communication skills; was polite and casual; and  
17 presented with average intelligence, good insight and judgment. (AR  
18 425-426.) Dr. Chang assessed moderate limitations in daily living,  
19 concentration, persistence and pace, and mild limitations in social  
20 functioning. (AR 428-430.)

21 The State Agency reviewing physician, Dr. Patterson, did not  
22 agree with the assessment rendered by Dr. Abad-Santos, and assessed  
23 mild limitations in most functional areas. (AR 28, 502-518.) Dr.  
24 Patterson reviewed Plaintiff's treatment records which indicated that  
25 he had the capability to seek out appropriate care for his physical  
26 conditions but was not receiving any treatment for depression. She  
27 also indicated that the conclusions rendered by Dr. Abad-Santos "lack  
28 any supporting objective evidence and seem extreme in a context in



1 which this claimant is not receiving any treatment, not even  
2 psychotropic meds typically prescribed for assistance w/pain  
3 management and commonly prescribed by orthopedic MDs or pain  
4 management specialists." (AR 518.)

5 The ALJ determined that Dr. Patterson's rationale was entitled to  
6 significant credibility because the record failed to document any  
7 current regular mental treatment, or consultation with an appropriate  
8 mental health specialist. (AR 30.)

9 An ALJ can reject the opinion of an examining physician in favor  
10 of that of a non-examining physician if based on specific and  
11 legitimate reasons supported by substantial evidence in the record.  
12 See Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995).

13 Looking at the record as a whole, on a longitudinal basis, the  
14 Court cannot find error in the ALJ's assessment, because despite  
15 seeking care for his physical condition on a very assertive basis,  
16 Plaintiff did not do the same with regard to any mental impairment,  
17 and there is no indication that Plaintiff was unaware of his ability  
18 to obtain treatment, or could not afford treatment if it had been  
19 prescribed. Plaintiff was not given any psychotropic or other  
20 medications for his asserted severe mental condition. Nevertheless,  
21 the ALJ did assess depression as a severe impairment, and accommodated  
22 that finding by determining that Plaintiff had the capacity to only  
23 perform simple, routine tasks with occasional contact with the public  
24 and co-workers. (AR 29.) Essentially, as the ALJ noted, Plaintiff had  
25 some depression because he had not been employed for some time, but  
26 this did not constitute a disabling condition or one which would  
27 provide a need for further limitations in Plaintiff's mental RFC.  
28 While Dr. Abad-Santos found a greater level of functional limitations,

1 including some marked limitations, as the ALJ and Dr. Patterson noted,  
2 these conclusions lacked any clinical support and were extreme in view  
3 of the fact that Plaintiff was not receiving any treatment whatsoever  
4 for these conditions. (AR 28, 518.)

5 Finally, because the functional restrictions assessed by Dr.  
6 Abad-Santos were so extreme and out of line with the other objective  
7 evidence in the record, any error committed by the ALJ in failing to  
8 further assess or evaluate these limitations must also be considered  
9 harmless error.

10 For the foregoing reasons, the Court determines that Plaintiff's  
11 first issue does not have merit.

## 12 II

### 13 THE ALJ DID NOT PROPERLY DETERMINE THAT PLAINTIFF COULD PERFORM 14 OTHER WORK AT STEP FIVE OF THE SEQUENTIAL EVALUATION PROCESS

15 At Step Four of the Sequential Evaluation, the ALJ determined  
16 that Plaintiff could not perform any of his past relevant work as a  
17 production labor/general assistant; cable installer; construction  
18 worker; and field worker. This was consistent with the testimony at  
19 the hearing provided by the Vocational Expert ("VE"). (AR 31-32, 61-  
20 65.)

21 The ALJ determined, however, that, based upon the VE's testimony,  
22 Plaintiff would be able to perform the requirements of representative  
23 light SVP2 occupations such as assembler and janitorial worker. (AR  
24 32.)

25 Plaintiff asserts that the ALJ's determination was erroneous  
26 because the alternative jobs identified at Step Five require a  
27 Language Level 1, which in turn requires a passive vocabulary of  
28

1 recognizing the meaning of 2,500 words, printing simple sentences, and  
2 speaking simple sentences. (See DOT codes 712.687-010, 323.687-014.)  
3 Thus, the Court must examine whether the ALJ properly found  
4 alternative jobs at Step Five, and whether literacy or illiteracy was  
5 correctly evaluated.

6 The ALJ specifically found that Plaintiff has a limited education  
7 and is able to communicate in English. (AR 32, citing 20 CFR §§  
8 404.1564 and 416.964.)

9 20 CFR § 404.1564(b)(I) defines illiteracy as "The inability to  
10 read or write. We consider someone illiterate if the person cannot  
11 read or write a simple message such as instructions or inventory lists  
12 even though the person can sign his or her name. Generally, an  
13 illiterate person has had little or no formal schooling."

14 At the hearing before the ALJ, Plaintiff was assisted by a sworn  
15 interpreter. (AR 50.) At the outset of the hearing, the ALJ asked  
16 Plaintiff a couple of questions regarding his mastery of English.  
17 These were the following:

18 "ALJ: Do you speak any English?

19 CLMT: I understand some.

20 ALJ: Have you understood anything we've said so far?

21 CLMT: Yes.

22 ALJ: Can you speak English?

23 CLMT: Very little."

24 (AR 51.)

25  
26 In this litigation, the Commissioner cites this testimony as  
27 supportive of the ALJ's conclusion that Plaintiff is not illiterate  
28 within the meaning of the definition cited in the above regulation.

1 (JS at 21.) But this is far from persuasive, in part because at the  
2 time of his testimony, Plaintiff was being assisted by the sworn  
3 interpreter, and it is reasonable to therefore assume that the  
4 questions posed by the ALJ about Plaintiff's ability to speak and  
5 understand English were first translated into Spanish, and that the  
6 answers were provided by Plaintiff through the interpreter.

7 The Commissioner also notes that during the course of the  
8 hearing, Plaintiff indicated he recently became a United States  
9 citizen, that he has a driver's license, and that he drove his  
10 children to school each day. (JS at 21.) Nothing cited to the Court  
11 indicates that English literacy is required to become a United States  
12 citizen or to obtain a driver's license, or to drive one's children to  
13 school. Finally, the Commissioner notes that Plaintiff testified he  
14 has eight grades of schooling, which is argued as supportive of the  
15 ALJ's finding that Plaintiff is not illiterate. (See JS at 18, AR at  
16 53.) But again, this is not a supportable inference, in that Plaintiff  
17 testified that he was born in Mexico in October 1968 and came to  
18 California in 1986 when he was approximately 18 years old. (AR 131,  
19 486.) A reasonable inference might be that Plaintiff received  
20 schooling in grades one through eight in Mexico, when he was a minor.  
21 Clearly this would not contribute to a conclusion that Plaintiff was  
22 educated in English during his eight years of schooling. Consequently,  
23 for all of these reasons, there does not appear to be substantial  
24 evidence in the record from which the ALJ drew a conclusion that  
25 Plaintiff is able to communicate in English sufficient to make him not  
26 illiterate.

27 As Plaintiff's counsel argues, the jobs identified by the VE  
28 require a Language Level 1, which requires a passive vocabulary of

1 recognizing the meaning of 2,500 words, printing simple sentences, and  
2 speaking simple sentences. Plaintiff indicated that he does not know  
3 how to read or write English more than his own name. (See AR at 169.)  
4 Further, not only was he provided with a Spanish interpreter at the  
5 hearing, but he also was assisted by an interpreter at the internal  
6 medicine and psychiatric consultative examinations. (AR 491, 485.) It  
7 appears that at other medical appointments he also communicated  
8 through an interpreter. (AR 414.) None of this evidence contributes to  
9 a reasonable conclusion that Plaintiff had a sufficiently developed  
10 vocabulary that he could perform work requiring Language Level 1  
11 requirements.

12 The Commissioner's argument in response is that Plaintiff's past  
13 relevant work required Language Level 1 or 2, under DOT requirements.  
14 (See JS at 22-23.) Again, this fails to persuade, because it does not  
15 address DOT requirements for work as it is normally or usually  
16 performed.

17 In Singmuongthong v. Astrue, 210 WL 3715152 (E.D. Cal. 2010), the  
18 issue of literacy was at the forefront of the decision, with regard to  
19 whether an ALJ properly found that a claimant could perform her past  
20 relevant work. In that case, the plaintiff's past relevant work as it  
21 is usually performed required a Language Level of 2. The Magistrate  
22 Judge, following the lead of the Ninth Circuit in Pinto v. Massanari,  
23 249 F.3d 840, 847 n.5 (9th Cir. 2001), found that the ALJ had failed  
24 to elicit from the VE testimony that would explain the discrepancy  
25 between Plaintiff's language limitations and the DOT requirements of  
26 her past relevant work. (See 210 WL 3715152 at \*7, citing Massachi v.  
27 Astrue, 486 F.3d 1149, 1153 (9th Cir. 2007)(citing SSR 00-4p).)  
28 Consequently, the Magistrate Judge found that the VE's failure to

1 explain the effect of plaintiff's language limitations or English  
2 communication skills on her ability to perform her past relevant work  
3 constituted error, in that there was no accounting for the deviation  
4 from the Language Level 2 requirement of the past relevant work that  
5 the plaintiff had performed.

6 Similarly, in this case, the hypothetical questions posed by the  
7 ALJ to the VE simply postulated an individual with "eight grades of  
8 education." (AR 61.) It is therefore uncertain if the ALJ, utilizing  
9 this factor in the hypothetical, led to the VE's implicit conclusion  
10 that a person with eight grades of education would not be illiterate.  
11 Nothing in the hypothetical indicated to the VE that the eight grades  
12 of education may have occurred in the person's native country  
13 (Mexico), and had been given in the person's native language  
14 (Spanish).

15 Based on this error, the matter must be remanded for a de novo  
16 hearing.

### 17 18 III

#### 19 PLAINTIFF'S CREDIBILITY AS TO HIS SUBJECTIVE SYMPTOMS

#### 20 WILL BE REEVALUATED DE NOVO ON REMAND

21 As a third issue, Plaintiff asserts that the ALJ failed to  
22 provide clear and convincing reasons to reject his subjective  
23 testimony. At the hearing before the ALJ, Plaintiff testified that he  
24 was depressed, has crying spells, and on some occasions has considered  
25 suicide; that he spends most of his time at home, sometime watching  
26 TV; that he does not read; that he on occasion does some house  
27 cleaning; that he does not cook; and does almost no socializing. (AR  
28 56-57.)

1       The ALJ found that this testimony was not credible because, in  
2 part, it was inconsistent with what Plaintiff had indicated to the  
3 psychological consultive examiner. (AR 31.) But a review of those  
4 reports does not support the ALJ's conclusion that there was such a  
5 level of inconsistency as to depreciate Plaintiff's credibility. Thus,  
6 in the first report relied upon by the ALJ, prepared by Dr. Chang on  
7 January 4, 2010 (AR 423-433), under Activities of Daily Living, Dr.  
8 Chang found moderate impairment, noting that, "The patient is able to  
9 provide most of his self care, to take care of most of his personal  
10 hygiene, communicating, traveling and moving about, and doing some  
11 household chores." (AR 428.)

12       As to his social functioning, Dr. Chang reported that Plaintiff  
13 had some difficulties interacting appropriately with the general  
14 public, and while he gets along well with his immediate family  
15 members, his ability to communicate effectively is moderately impaired  
16 by insecurities, and he remains socially withdrawn, based on greatly  
17 diminished self esteem and depressed mood. He has difficulties  
18 interacting with strangers. (AR 429.) Dr. Chang also reported that  
19 Plaintiff's ability to sustain focus is very limited. (*Id.*)

20       In the later report referenced by the ALJ in the credibility  
21 section of the decision, Dr. Abad-Santos described Plaintiff's  
22 activities of daily living as follows:

23       "The claimant currently lives with wife and children.

24       The claimant cannot take care of self-dressing and self-  
25 bathing without help, but can take care of personal hygiene.

26       For transportation, the claimant rides with wife or drives  
27 car when he is not in severe pain.

28       Outside activities are walking as per advice of his

1 physicians.

2 The claimant is able to pay bills and can handle cash  
3 appropriately.

4 The claimant is unable to go out alone without his wife.

5 The claimant's relationships with family and friends are  
6 good.

7 The claimant can focus attention.

8 The claimant has difficulty completing household tasks due  
9 to severe back and knee pain.

10 The claimant has difficulty making his decisions.

11 On a daily basis, the claimant drives young children to  
12 school and watches TV."

13 (AR 492-493.)

14  
15 The Court does not perceive that these psychological reports  
16 contain substantial or material differences from Plaintiff's own  
17 reporting of symptoms or his activities of daily living.

18 As to physical impairments, the ALJ relied upon his observation  
19 that treating physicians had responded with limited and conservative  
20 treatment. (AR 31.) As Plaintiff's counsel correctly notes, there is  
21 evidence in the record that Plaintiff has been prescribed narcotic  
22 pain medications, such as Vicodin, since his knee surgery. (AR 233,  
23 259, 306, 383.) It would be difficult to fault Plaintiff for overly  
24 conservative treatment when he has been prescribed strong narcotic  
25 pain medications.

26 For the foregoing reasons, on remand, Plaintiff's credibility as  
27 to subjective symptoms will be evaluated de novo.

28 //



This matter will be remanded for further hearing consistent with this Memorandum Opinion.

IT IS SO ORDERED.

DATED: July 18, 2014

/s/  
VICTOR B. KENTON  
UNITED STATES MAGISTRATE JUDGE